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# Supreme Court of the United States

OCTOBER TERM, 1950.

## BRIEF ON MERITS.

No. 209

EMICH MOTORS CORPORATION and
U. S. ACCEPTANCE CORPORATION,
*Petitioners,*

*vs.*

GENERAL MOTORS CORPORATION and
GENERAL MOTORS ACCEPTANCE CORPORATION,
*Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

## BRIEF FOR PETITIONERS.

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IN THE

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**No. 209**

EMICH MOTORS CORPORATION and
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GENERAL MOTORS CORPORATION and
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On Writ of Certiorari to the United States
Court of Appeals for the Seventh Circuit

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## BRIEF FOR PETITIONERS.

### Opinion Below.

The opinion of the Court of Appeals (R. 9448, 9496) is reported at 181 F. (2d) 70. This case is founded upon the antecedent criminal case against respondents reported as *United States* v. *General Motors Corporation* (C.A. 7) 121 F. (2d) 376.

### Jurisdiction.

The decision to be reviewed was rendered by the Court of Appeals for the Seventh Circuit on March 3, 1950 (R. 9448) and a timely petition for rehearing was denied on April 26, 1950 (R. 9551). The petition for certiorari was filed on July 20, 1950, and was granted in limited form[1]

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[1] Certiorari was limited to the question whether the Court of Appeals erred in construing Section 5 of the Clayton Act as not permitting: (a) the admission in the instant case of

on October 9, 1950. The jurisdiction of this court rests on Title 28, Sec. 1254(1) U.S.C. (62 Stat. 928).

## QUESTIONS PRESENTED.

1. Does not the public policy underlying Section 5 give a private litigant the right in a subsequent suit against a convicted violator of the Anti-Trust Laws, to rely as *prima facie* evidence on every matter and fact offered by the Government to sustain its claim?

2. Under Section 5 of the Clayton Act, may a prior Government anti-trust judgment be used by a private litigant so as to establish *prima facie*, either

   a. All facts and matters offered by the Government to support its contentions,

   b. All matters litigated and determined in the prior Government suit,

depending upon whether the causes of action are the same?

3. In determining what was adjudicated and determined by a prior judgment,

   a) is it not proper to examine the pleadings, evidence, instructions and opinions on appeal?

   b) Is this not the function of the jury under Section 5 of the Clayton Act?

4. Under the doctrine of *res judicata* may not a private litigant rely conclusively on a criminal judgment which the Government has obtained against his adversary in a prior anti-trust suit where there is identicality of issues, so as to bar or estop any defense as to those issues?

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(Continued from page 1)
the indictment in the antecedent criminal case against Respondents, nor (b) the judgment therein to be used as evidence that the conspiracy of which Respondents had been convicted occasioned Emich Motors' cancellation. A petition to remove the limitation on the grant of the certiorari was denied by this court on November 27, 1950.

## STATUTE INVOLVED.

Section 5 of the Clayton Act (38 Stat. 731; T. 15, S. 16, U.S.C., providing insofar as here pertinent:

> "A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be *prima facie evidence* against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: * * * "

## STATEMENT OF FACTS.

Petitioners brought this action for treble damages pursuant to Sec. 4 of the Clayton Act (U. S. C., T. 15, Sec. 15).

Petitioners are two related corporations: Emich Motors Corporation, which, between 1932 and 1936, operated two Chevrolet dealerships, one in Chicago and the other in a suburb, Oak Park (R. 1047, 8383) and U. S. Acceptance Corporation (formerly named E.M.C. Finance Co.), which was organized in July, 1934, to take over the financing of some of Emich Motors' installment sales, previously handled in substantial part directly by the latter (R. 1097).

Respondents, defendants below, are two corporations: General Motors Corporation, the automobile manufacturer (sometimes called "General Motors" or "GM"); and General Motors Acceptance Corporation, a related discount company (sometimes called "GMAC"). During and prior to 1936, GM sold its cars through Chevrolet and other of its car-selling corporate units to dealers such as Emich Motors, who were independent contractors (R. 382, 47, 79).

On November 17, 1939, Respondents were convicted (R. 7496, 7497) by a jury in the United States District Court at South Bend, Indiana, under an indictment (R. 7480-7494) which charged them with a conspiracy to restrain unreasonably the interstate trade and commerce in Chevrolet and other automobiles manufactured by General Motors, for the purpose of controlling the financing essential to the wholesale purchase and retail sale of such cars, and that in furtherance of this purpose the conspirators devoted themselves to concerted action by which GMAC was imposed on dealers who were engaged in the purchase and sale of General Motors cars. The specific conduct charged in the indictment as being in furtherance of the illegal purposes was: (1) Requiring dealers to promise to use GMAC exclusively as a condition to obtaining General Motors franchises; (2) making contracts for short periods and cancellable without cause, *cancelling or threatening to cancel such contracts unless GMAC facilities were used;* (3) discriminating against dealers not using GMAC by refusing to deliver cars when ordered, delaying shipment and shipping cars of different number, model, color or style; (4) compelling dealers to disclose how they financed their wholesale purchases and retail sales, examining and inspecting books and accounts in order to procure this information, and requiring dealers to justify their using other financing media; (5) giving special favors to dealers using the wholesale and retail facilities of GMAC; (6) granting special favors to GMAC which were denied to other discount companies; (7) giving dealers a rebate from the GMAC financing facilities; and (8) compelling dealers to refrain from using other finance companies by all other necessary, appropriate or effective means. (R. 7488-7493).

The instructions (Crim. R. 1931-1945, 1946-1954) under which the jury returned its finding of guilty are analyzed by the Court below in its opinion on the criminal appeal 121 F. (2d) 384-385.

Respondents appealed their conviction to the Court of Appeals for the Seventh Circuit, which affirmed. ((C.A. 7) 121 F. (2d) 376). Thereafter, certiorari was denied by this Court (R. 7501, 314 U. S. 618).

The criminal case against Respondents is hereinafter referred to as the GM criminal case. The record of that case is before this Court by stipulation of the parties (R. 9562), and consists of the record as filed with this Court in Respondents' petition for certiorari (No. 352, Oct. Tm., 1941. References to it are identified hereinafter as "Crim. R.".)

Petitioners' amended complaint was filed in the United States District Court at Chicago, Illinois (LaBuy, J.) and in it, Petitioners, praying for treble damages, alleged that they had been injured by the same conspiracy for which Respondents had been indicted and convicted in South Bend, Indiana (R. 4-12). A copy of the indictment was attached to and made a part of the amended complaint (R. 13-27).

The trial began October 20, 1947, and was the longest civil jury trial in the history of the Northern District of Illinois (R. 9413). It lasted over four months. The defense covered more than three months (R. 1602, 6970), involving 204 witnesses and 166 exhibits. Plaintiffs presented their side of the case in a three-week period (R. 322, 1594), using only 24 witnesses but introducing 407 exhibits consisting for the most part of General Motors' own documents previously introduced in the criminal case.

The jury returned verdicts in the amounts of $350,000 for Emich Motors and $62,000 for U. S. Acceptance Corporation (R. 9110-9112), which were trebled under the statute (R. 9112). An appeal was taken from this judgment. Subsequently, the District Court awarded costs and attorneys' fees to Petitioners. A second appeal was taken, and the two appeals were later consolidated (R. 9555). Upon the consolidated appeal, the case was reversed and remanded for new trial (R. 9469).

In the GM criminal case, the Government introduced evidence to sustain the charge that Respondents conspired to compel dealers to use GMAC financing. Included in the evidence introduced to sustain the charge, in addition to documentary evidence, was that of 38 then dealers and 10 ex-dealers, including Fred Emich, who owned and controlled Petitioners. The evidence supported every coercion embodied in the concert of action described and set forth in the indictment.[1] Emich's testi-

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[1] The terms of the conspiracy and the means and methods by which it was effectuated are found in paragraphs 37-62 of the indictment (R. 7488-7493). The coercions therein alleged are broken down into seven general headings. The witnesses giving evidence supporting those charges given at the criminal trial are here set forth:

1. DEFENDANTS REQUIRED DEALERS TO PROMISE TO USE GMAC AND NOT TO USE OTHER FINANCE COMPANIES AS A CONDITION TO OBTAINING A FRANCHISE. Light (Crim. R. 590); Blades (Crim. R. 667); Heilman (Crim. R. 522); Burwell (Crim. R. 703); Dollahan (Crim. R. 631); Geiger (Crim. R. 685); Harris (Crim. R. 551); Kensinger (Crim. R. 380).
2. MAKING DEALER CONTRACTS FOR SHORT PERIODS CANCELLABLE WITHOUT CAUSE— Stewart (Crim. R. 211); Young (Crim. R. 515); McLain (Crim. R. 256); Crim. R. 2902; Crim. R. 210; Crim. R. 1670.
3. CANCELLATIONS AND THREATS TO CANCEL CONTRACTS OF DEALERS WHO FAIL TO USE FINANCE FACILITIES OF GMAC—

mony was summarized at considerable length by the Court of Appeals on the criminal appeal, which at that time referred to him as a typical victim of the conspiracy (121 F. (2d) 396). He testified that he had been a Chevrolet dealer in Chicago from 1932 to 1936, and that because he owned his own finance company and refused to use GMAC, he received unordered cars and trucks, and great quantities of unordered accessories. Other coercions which he testified he experienced consisted of threats made to him of cancellation if he did not use

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Mendez (Crim. R. 264); Phillips (Crim. R. 434); Street (Crim. R. 683); Jones (Crim. R. 755); Weaver (Crim. R. 291); Peterik (Crim. R. 653); McGuire (Crim. R. (1610); Morrow (Crim. R. 775); Cooke (Crim. R. 409); Teague (Crim. R. 399); Kessler (Crim. R. 659); Randall (Crim. R. 737); McDonald (Crim. R. 766); Elliott (Crim. R. 593); Wilson (Crim. R. 339); Disher (Crim. R. 567); Williger (Crim. R. 546); Dollahan (Crim. R. 628); Neidhard (Crim. R. 617); Traendly (Crim. R. 446); Moyer (Crim. R. 326); Patterson (Crim. R. 561); Emich (Crim. R. 293); Magers (Crim. R. 410); Smith (Crim. R. 503); McCrary (Crim. R. 604); Stolz (Crim. R. 688); Amberson (Crim. R. 756).

4. DISCRIMINATORY PRACTICES IN THE DELIVERY AND NON-DELIVERY OF CARS TO DEALERS ON THE BASIS OF THEIR PATRONAGE OR FAILURE OR REFUSAL TO PATRONIZE IN WHOLE OR IN PART THE SERVICES OF GMAC—

**Car Shortages**—Emich (Crim. R. 299); Magers (Crim. R. 415); Craig (Crim. R. 697); McGuire (Crim. R. 708); Munson (Crim. R. 720); McDonald (Crim. R. 763); Morrow (Crim. R. 776); Bell Park Motors (Crim. R. 4002); Blades (Crim. R. 669); Disher (Crim. R. 579); Smith (Crim. R. 511); McCrary (Crim. R. 606); Mendez (Crim. R. 262); Hellman (Crim. R. 262); Metcalf (Crim. R. 644); Stolz (Crim. R. 689); Henrie (Crim. R. 1037); Griffin (Crim. R. 1177);

**Forcing of Cars on Dealers**—Burger (Crim. R. 366); Dollahan (Crim. R. 632); Emich (Crim. R. 299); Hellman (Crim. R. 538); Kessler (Crim. R. 655); Magers Crim. R. 415); Metcalf (Crim. R. 644); Mendez (Crim. R. 262); Miller (Crim. R. 677); McCrary (Crim. R. 608); Neidhard (Crim. R. 619); Stolz (Crim. R. 689); Teague (Crim. R. 400); Weaver (Crim. R. 291); Blades (Crim. R. 668); McDonald (Crim. R. 763); Young (Crim. R. 519).

GMAC, receipt by him of cars of wrong colors and models, and withholding of cars from him. He was told these practices would cease if he would give GMAC his finance business, which he refused to do, whereupon his franchises were cancelled in 1936. He further testified that upon his appeal to the president of General Motors for reinstatement he was told that the cancellation was for his failure to use GMAC and that it was the policy of General Motors to require dealers to use the facilities of that corporation, and if he would not agree to do so

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**Forcing of Cars, Accessories, Equipment, etc. on Dealers**—Wilson (Crim. R. 343); Street (Crim. R. 682); Geiger (Crim. R. 685); Craig (Crim. R. 695); Emich (Crim. R. 304); Disher (Crim. R. 574); Dollahan (Crim. R. 634).

**Insistence Upon Unnecessarily Expanding Facilities, New Buildings, Etc.**—Mendez (Crim. R. 366); Lesher (Crim. R. 1536); Neidhard (Crim. R. 617); Disher (Crim. R. 573); Jones (Crim. R. 744); Dollahan (Crim. R. 636); Kessler (Crim. R. 659); Traendly (Crim. R. 454); Teague (Crim. R. 401); Peterik (Crim. R. 650).

**Competitive Dealers Put In Territory**—Traendly (Crim. R. 454); Morrow (Crim. R. 776); Patterson (Crim. R. 561); Disher (Crim. R. 567).

5. REQUIRING DEALERS TO DISCLOSE THE MANNER IN WHICH THEY FINANCE THEIR CARS AND FORCING DEALERS TO JUSTIFY THE USE OF THEIR FINANCE COMPANIES, BOOKKEEPING AND ACCOUNTING—Mendez (Crim. R. 266); Jones (Crim. R. 744); Government's Exhibits 77A, 35, 37, 39, 166, 181, 185, 186.

**10-Day And 30-Day Reports**—Crim. R. 881; Crim. R. 879-81; Crim. R. 3881; Crim. R. 3883; Crim. R. 1415, Government's Exhibits 13, 14, 34, 116, 165, 167.

**Collection of Time Sales Data**—Mendez (Crim. R. 267); Weaver (Crim. R. 288); Emich (Crim. R. 296); Traendly Crim. R. 252); Underwood (Crim. R. 623); Peterik (Crim. R. 650); Crim. R. 395; Crim. R. 881.

6. GRANTING SPECIAL FAVORS TO GMAC WHICH ARE DENIED OTHER DISCOUNT COMPANIES—Brown (Crim. R. 996); Smith (Crim. R. 504); Diezendorf (Crim. R. 920); Gale (Crim. R. 234); McCreery Crim. R. 140); Raskob (Crim. R. 949); Deane (Crim.

it would be useless for the president of General Motors to discuss reinstatement with the appropriate Chevrolet officials (R. 293-324).

Respondents contested this evidence, and offered seven witnesses in opposition to Emich.[1] In addition, they contested all evidence establishing coercions.

In the trial of the instant case to sustain their burden as to the existence of the conspiracy, petitioners offered the testimony of sixteen former GM dealers, thirteen of whom had been Government witnesses in the GM criminal case (Crim. R. Index, pp. 5-6), the testimony of two former GM employees (R. 406, *et seq.*, 939, *et seq.*), and numerous documents from Respondents' own files.

To prove the identicality of the conspiracy and to obtain the benefit of the prior conviction pursuant to Section 5 of the Clayton Act (38 Stat. 731, U.S.C., T. 15, Sec. 16), Petitioners introduced into evidence the essential records of the GM criminal case, including the judgment proper and the verdict and indictment incorporated therein by its terms. (R. 327-344). Also introduced was

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R. 1423); Coates (Crim. R. 489); Grant (Crim. R. 1376); Holler (Crim. R. 1676); Disher (Crim. R. 580); Coyle Crim. R. 1765); Crim. R. 158; Crim. R. 902-903; Crim. R. 954; Crim. R. 489; Crim. R. 920-921; Crim. R. 187; Government's Exhibits 6, 18, 18A, 20A to 20L; 30, 39, 45, 49, 51, 158, 165.

7. RESTRAINTS ARISING OUT OF DEFENDANTS' PRACTICES IN RELATION TO THE DEALERS' RESERVE, FORMING A PART OF THE FINANCE CHARGE WHICH IS PAID TO DEALERS—McCreery Crim. R. 154); Burger (Crim. R. 362); Hellman (Crim. R. 524); McCrary (Crim. R. 606); Brown (Crim. R. 987); Raskob (Crim. R. 968); Crim. R. 866; Crim. R. 869-70; Government's Exhibits 9, 10, 22-24, 26, 29, 30, 32, 34, 44, 49, 176 D and F, and 181 H).

[1] Balcom, Crim. R. 1161-1169; Doran, Crim. R. 1301-1304; Hill, Crim. R. 1315-1333; Smith, Crim. R. 1334-1336; Holler, Crim. R. 1657-1659, 1676; Knudsen, Crim. R. 1837-1838.

the record of the evidence adduced at the GM criminal trial which, under the trial court's ruling, was not permitted to go to the jury. (R. 443). Defendants themselves introduced the verdict which incorporated the indictment by its terms. (R. 8553).

Respondents offered in defense a long line of witnesses, who denied practically everything to which Petitioners' sixteen dealer-witnesses and the two former GM employees testified. The same witnesses who had testified against Emich in the GM criminal trial, testified as to the same matters in the trial here, except one who had died in the meantime.[2]

The Court of Appeals for the Seventh Circuit reversed the judgment in favor of Petitioners on several grounds, including the following:

(a) That the criminal judgment, which was admitted in evidence under Section 5 of the Clayton Act, was used as evidence of the cancellations by Respondents of Emich Motors' franchises, pursuant to the conspiracy.

(b) That the admission of the indictment to the jury permitted it to look to the indictment to ascertain the means and the acts committed in furtherance of the conspiracy of which Respondents had been convicted.

## SPECIFICATION OF ERRORS.

The Court of Appeals erred:

In construing Section 5 of the Clayton Act as not permitting: (a) the admission in the instant case of the indictment in the antecedent criminal case against respondents, nor (b) the judgment therein to be used as evidence that the conspiracy of which respondents had been convicted occasioned Emich Motors' cancellations.

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[2] Balcom, R. 4193; Doran, R. 6558, 6594; Hill, R. 6058; Smith, R. 6447, 6569; Holler, R. 6731.

## SUMMARY OF ARGUMENT.

1. Public policy underlying Section 5 of the Clayton Act (T. 15, S. 16, U.S.C.) requires that a private litigant in a treble damage suit under Sec. 4 of that Act (T. 15, S. 15, U.S.C.) who relies on a prior obtained Government judgment be given the benefit of all facts and matters offered to sustain the Government's claims.

2. Whether Section 5 of the Clayton Act be interpreted as incorporating either broad or narrow principles of estoppel, the criminal judgment against Respondents was proof that they had cancelled the franchises of Emich Motors pursuant to the conspiracy.

3. The indictment under which Respondents were found guilty of violating the Anti-Trust Laws was properly admitted to the jury. In any event, its admission was not prejudicial error.

4. Respondents are conclusively estopped from denying that they cancelled Emich Motors' franchises pursuant to the conspiracy of which they had been convicted, independent of Section 5 of the Clayton Act.

## ARGUMENT.

### I.

### The Court of Appeals Has Nullified the Public Policy Underlying Section 5 of the Clayton Act.

#### A. Introduction

On October 15, 1914, the Congress enacted Section 5 of the Clayton Act (38 Stat. 731, U.S.C., T. 15, S. 16), providing insofar as here pertinent, that:

> "A final judgment or decree rendered in any criminal prosecution or in any suit or proceeding in equity brought by or on behalf of the United States under the antitrust laws to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto; * * *."

For the first time since then, this Court is called upon to construe that section so as to determine what benefits were intended to be bestowed by it upon the private litigant.

In so doing, this Court will decide questions of vital importance to victims of anti-trust conspiracies in a legion of pending and future cases. The Government, in its administration of the anti-trust laws, is directly concerned, since the statute was also designed for the purposes of multiplying the agencies which would help enforce those laws, making them more effective, and of providing an ancillary force of investigators to aid the Department of Justice in such enforcement. *Maltz* v. *Sax*, (C.A. 7) 134 F. (2d) 2, 4; *Quemos Theatre Company, Inc.* v. *Warner Brothers, Inc.*, (D.C., N.J.) 35 F. Supp. 949, 950.

The opinion of the Court of Appeals in the instant case has dealt the anti-trust laws a severe blow. By its holding, Section 5 has been so narrowly construed as to render prior judgments of conviction of violators of the anti-trust laws virtually useless as evidence in actions by their victims, contrary to Congressional intent. Thus the purpose of the statute to relieve private litigants of the overwhelming burden and expense of setting up and again establishing the facts which the Government has proved in prior cases has been completely frustrated. This burden can be borne by virtually no victim.

**B. The purpose of section 5, as is seen from its legislative history, is to bestow upon private litigants the benefit of all the facts and evidence proved in prior suits where judgments or decrees were obtained by the government against anti-trust violators.**

President Wilson recognized that victims of anti-trust violators, in the very nature of things, could not afford and did not have the power to wage long and arduous litigation with industrial giants. He, therefore, recommended to Congress in a special message on January 20, 1914, that injured private individuals be granted "the right to found their suits for redress upon the *facts* and *judgments* proved and entered" in Government suits. He urged that the private litigant ought not to "be obliged to set up and establish again the facts which the Government has proved". (Albert Shaw, The Messages and Papers of Woodrow Wilson. Vol. 1, pp. 54-55; quoted in 51 Cong. Rec. p. 15,826.)

Under the stimulation of this message, Congress enacted Section 5. The statements of members of the Senate Judiciary Committee and other senators and representatives during debate on this section indicate their full

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intention that the private litigant have the benefits which President Wilson urged be granted.[1]

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[1] This becomes evident from the following:

The original House Bill provided that the judgment would be "conclusive evidence of the same facts" proved in the Government's case. (H.B. 15657, Congressional Record, Vol. 51, 63rd Congr., 2nd Sess., p. 13659.) The Senate Amendment changing the Section to its present form was intended only to change "conclusive" to "prima facie."

The views as to the effect of the Senate Amendment appear from the following excerpts from the Congressional Record, Vol. 51, 63rd Congr., 2nd Sess.:

Senator Walsh of Montana, a member of the Senate Judiciary Committee: "The essential difference between the House provision and the Senate amendment is that under the House provision all judgments rendered in anti-trust cases are made conclusive, both as to the facts and as to the law, * * * **while the Senate provision makes the judgment simply prima facie evidence of the facts** therein determined." (p. 13851.)

Representative Floyd of Arkansas, a House conferee: "The only difference between this (the Senate Amendment) and the House provision is that in this the judgment is made prima facie evidence, while the House provision made it conclusive." (p. 16,319.)

Senator Chilton of West Virginia, also a member of the Senate Judiciary Committee: "* * * the Committee on the Judiciary, without a single exception, was desirous of enacting a statute with teeth in it, as the expression is commonly used, one that would accomplish some good and would not merely play with this great subject * * *. What we tried to do was to have some way by which the citizen could **have the advantage of the evidence collected and produced by the Government** * * *." (pp. 13854, 13856.)

Senator Reed of Missouri, another member of the Committee: The Bill, as amended, enables the citizen "to lay down in court the **transcript of the evidence** secured by months of labor and toil, together with the decree of the court * * *." (p. 15822.)

Senator Nelson of Minnesota: "At great expense, with great labor, and with great loss of time this evidence is secured and accumulated" by the Government. The poor litigant should not "be compelled to scour the country to **get the evidence.**" (p. 15938.)

These benefits were expressly designed to flow in but one direction. Only the injured party, and not the offender could claim them. This feature of the statute was based upon the recognition that the offender has had his day in Court, and the victim was to be saved "long and burdensome litigation". *Twin Ports Oil Company* v. *Pure Oil Company*, (D.C., D. Minn.) 26 F. Supp. 366, 369.

**C. The Court of Appeals has erroneously held that private litigants may not have these benefits, contrary to congressional intent.**

In contravention of this public policy, the Court of Appeals held that petitioners were entitled to rely upon the GM criminal judgment only "as *prima facie* evidence that defendants had been guilty of a conspiracy to restrain dealers' interstate trade and commerce in General Motors cars for the purpose of monopolizing the financing essential to the movement of those cars". (R. 9454.) Under this holding, the judgment could be used for that purpose only and was construed by the Court below not to be evidence (R. 9455) of any facts offered, proved and determined in the criminal suit, including the cancellation of Emich Motors' franchises pursuant to the conspiracy. Further, the Court below held that it was for the trial court to instruct the jury as to the limited evidentiary value of the judgment (R. 9454).

Under such a rule, a plaintiff in an anti-trust suit who seeks to prove a conspiracy by means of a judgment of conviction under the usual type of Government anti-trust indictment would be faced with an insurmountable burden. In the ordinary case, he would be under the necessity of convincing the jury by means of a hollow instruction the the defendants were convicted of some vaguely described conspiracy to violate the anti-trust laws whereas

defendants would have recourse to the testimony of numerous live witnesses, as in the instant case where over 100 testified on this phase alone. The benefits of Section 5 would be a mirage and the private litigant would not be in any real sense relieved of the burden and expense of establishing his case afresh. Thus, the statutory policy to relieve him of these burdens would be thwarted.

**D. The reasoning of the Court of Appeals is applicable to virtually all anti-trust cases founded upon prior government suits, would render judgments therein obtained of no value as evidence, and hence is in derogation of the public policy underlying the statute.**

In holding that only the conspiracy had been established by the criminal judgment, the court below reasoned as follows:

> 1. The indictment charged a conspiracy to unreasonably restrain interstate trade in General Motors cars through concerted action embracing a large number of means and acts, including cancellations of dealers (R. 9450).
>
> 2. But the trial court in the criminal case instructed the jury that the Government did not have to prove all the acts alleged in the indictment in order to establish the conspiracy charged (R. 9451, 9456), and, in any event, apart from that instruction it was not necessary for the Government to prove *any* act or means, save for venue purposes, in order for the jury in the criminal case to find the defendants guilty[1] (R. 9455).
>
> 3. Therefore the judgment established none of the acts or means charged in the indictment (R. 9455), nor any of the material facts proved by the Government, including the cancellations of dealers, of which Emich Motors was one, pursuant to the conspiracy. (R. 9456)

This reasoning leads to results which are most bizarre and intolerable.

The indictment in the *GM* criminal case was a stock form of indictment generally used by the Government in anti-trust conspiracy cases. In such indictments the conspiracy is set forth in a general charging paragraph followed by a number of paragraphs setting forth the means of the conspiracy and the acts done in furtherance thereof.[1]

The instruction given by the trial court in the *GM* criminal case is a stock form of instruction given in such cases. For example, see the instruction given in the

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[1] **Cases in the past:**

U. S. v. N. Y. Gt. Atl. & Pac. Tea Co., Inc. (U.S.D.C., E.D., Ill.), Docket No. 16153 (Crim.), reported as 67 F. Supp. 626, aff'd 173 F. (2d) 79; U. S. v. Local 807, I. B. T., 315 U. S. 521 (Oct. Term, 1941, No. 131), Transcript of Rec., Vol. 1, pp. 46-49, 51-53; Greater N. Y. Live Poultry C. of C. v. U. S. (this Ct., Oct. Term, No. 758); U. S. v. The Central Supply Ass'n, et al. (U. S. D. C., N. D., Ohio, E. D., No. 16750, reported at 40 F. Supp. 964); U. S. v. Bausch & Lomb Optical Co., et al. (U. S. D. C., S. D., N. Y., No. 107-169, reported at 34 F. Supp. 267); U. S. v. St. Louis Tile Contractors' Ass'n, et al. (U. S. D. C., E. D., Mo., E. D., No. 21552); U. S. v. Aluminum Co. of America, et al. (U. S. D. C., S. D., N. Y., No. 109-189, reported at 41 F. Supp. 347).

**Other cases now pending:**

U. S. v. Stern, et al. (U.S.D.C., E.D., Pa., (Cr. No. 15466); U. S. v. The Jamison Cold Storage Door Company, et al. (U.S.D.C., N.D., Ohio, E.D., Cr. No. 19875); U.S. v. The Association of American Battery Manufacturers, et al. (U.S.D.C., W.D., Mo., Cr. No. 17652); U. S. v. New Orleans Ice Delivery Corporation, et al. (U.S.D.C., E. D., La., New Orleans Div., Cr. No. 23641); U. S. v. Krasnov, et al. (U.S.D.C., E.D., Pa., Cr. No. 15754); U.S. v. The West Texas-New Mexico Chapter, etc., et al. (U.S.D.C., W.D., Tex., El Paso Div., Cr. No. 45,500); U. S. v. Northern California Joint Council, etc., et al. (U.S.D.C., N. D., Cal., S.D., Cr. No. 32665; U. S. v. L. A. Young Spring and Wire Corp., et al. (U.S.D.C., E.D., Mich., S.D., Cr. No. 31756); U.S. v. Servel, Inc., et al. (U.S.D.C., W.D., Pa., Cr. No. 13206).

criminal case involved in *Local 167* v. *U.S.*, 291 U.S. 293, hereinafter discussed at pp. 24-26[1]

Moreover, only the most flagrant violators are prosecuted criminally. Thus, under the holding, victims seeking redress or relief are confronted with the following paradox:

Because the conspiracy was large, with many means and acts; because the violation was so flagrant as to warrant criminal prosecution; because the broad dimensions of the conspiracy were such as to make the difficulties and expense of proof most severe—indeed impossible—for the victim—*precisely, then, the statute is to be construed as giving the smallest possible measure of assistance to the victim.* Needless to argue, Congress never intended such an incongruous result. Because the construction of the statute by the Court below leads to such absurd results and frustrates public policy, it must be disfavored unless compelled by the terms of the statute. *Haggar Co.* v. *Helvering,* 308 U.S. 389, 394. As is seen hereinafter, p. 41, there is no such compulsion.

A statute will not be given a construction by which its effectiveness would be seriously impaired where a different construction is possible. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U.S. 381, 392.

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[1] The jury there was instructed as follows (This Court, Oct. Tm., 1930, No. 758, record pages 700, 710:

"* * * a mere agreement * * * constitutes an offense and it is not necessary in order to make out the offense that anything be done * * * in carrying out its objects (p. 700) * * * it is not necessary * * * that every detail of the charge * * * in the indictment should be found in order to return a verdict * * *. It is not necessary to find every last word * * * in the indictment in that respect; if you find * * * interstate commerce, * * * an unlawful agreement, and * * * an unreasonable restraint, however, it might have been brought about if one or more of the plans in the indictment actually took place (p. 710) * * *."

**E. The construction by the Court below of Section 5 as incorporating the narrow doctrine of collateral estoppel is contrary to the public policy underlying the statute.**

The reasoning of the Court of Appeals has made it quite clear that it construed Section 5 as incorporating a restricted and limited doctrine of estoppel by judgment. This is not explicitly stated by the Court. However, the opinion can be read in no other way as may be seen from the express language used, from its recital of Respondents' arguments, demonstrating their total reliance upon a restricted and limited doctrine, and from the fact that the Court's conclusion coincides almost entirely with that which respondents claimed should result from the application of such a doctrine (R. 9453-9459). The Court below was not warranted in applying so restricted a doctrine. It was under no compulsion to read the words of the statute "as to all matters respecting which said judgment * * * would be an estoppel as between the parties thereto" as incorporating by reference into the statute the doctrine of estoppel by judgment. This is clear from the fact that while the statute uses both the words "judgment" and "estoppel", it does not use the term of art "estoppel by judgment"[1].

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[1] To inject this term of art into the statute is, in effect, to take undue advantage of the propinquity of these words, and to re-word the statute as though it read that the judgment was to be evidence "as to all matters respecting which said judgment * * * would be an estoppel as between the parties thereto **in a subsequent suit by the Government on a different cause of action.**" Yet the italicized words are not to be found in the statute, no more so than the term of art, "estoppel by judgment."

It is elementary that courts will not add words to a statute, U.S. v. Temple, 105 U. S. 97, 99, especially when to do so will frustrate a strong public policy to which the statute gives expression. Brown v. U. S. (App. D.C.), 30 F. (2d) 474, 475.

There is a crucial difference between the application of estoppel by judgment in the ordinary case and its application in cases contemplated by the statute. In the former, as is hereinafter demonstrated at pp. 21, 22, the one against whom the doctrine is invoked is foreclosed absolutely from making any defense to matters previously adjudicated; hence caution is required in limiting the issues as to which the defense is precluded. But no such consideration obtains here, since defendants, under the statute, are not foreclosed in any manner whatsoever in conducting their defense, even as to those matters in respect of which the prior adjudication would constitute a so-called "estoppel." Thus, *arguendo,* if the statute is deemed to refer to the doctrine, such reference is for the purpose of analogy only, there being no true estoppel under the statute. It is manifest then that the scope of the prior adjudication should not be compressed rigidly and inelastically into the conservative mold of estoppel by judgment as applied in the ordinary case. To do so defeats the strong public policy to mitigate, insofar as possible, the inequalities between the parties in litigating anew matters which defendants have already litigated to the hilt.

We now proceed to demonstrate that under any principles of *res judicata* or estoppel by judgment, sometimes referred to as collateral estoppel, the Court below erred in holding that the criminal judgment was not evidence of the impact of the conspiracy on Emich Motors.

## II.

## On Application Of Either Broad Or Narrow Principles Of Estoppel The Criminal Judgment Was Evidence That Emich Motors' Franchises Were Cancelled Pursuant To The Conspiracy.

### A. Section 5 is to be construed as providing for an application of broad principles of estoppel, i.e., res judicata and not the narrow principles of estoppel by judgment or collateral estoppel.

Estoppels are of two kinds,—the broad and the narrow. The broad kind is referred to as "res judicata"; the narrow is sometimes described as "estoppel by judgment, or collateral estoppel". The scope and application of these two types of estoppel are defined and explained in a recent opinion of this Court in *Commissioner* v. *Sunnen*, 333 U.S. 591. The Court stated at p. 597, as follows:

> "The general rule of res judicata applies to repetitious suits involving *the same cause of action*. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations. The rule provides that when a court of competent jurisdiction has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound 'not only as to every matter which *was offered and received to sustain or defeat the claim or demand*, but as to any other admissible matter which might have been offered for that purpose'. *Cromwell* v. *Sac County*, 94 US 351, 352, 24 L ed 195, 197. The judgment puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever, absent fraud or some other factor invalidating the judgment. See von Moschzisker, *"Res Judicata,"* 38 Yale LJ 299; Am L Inst Restatement, Judgments, §§47, 48.
>
> "But where the second action between the same parties is upon *a different cause or demand, the prin-*

> *ciple of res judicata is applied much more narrowly.* In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered,' *Cromwell* v. *Sac County, supra* (94 US 353, 24 L ed 198). * * * *matters which were actually litigated and determined* in the first proceeding cannot later be relitigated. Once a party has fought out a matter in litigation with the other party, he cannot later renew that duel. In this sense, *res judicata* is usually and more accurately referred to as estoppel by judgment, or collateral estoppel. See Am L Inst Restatement, Judgments, §§ 68, 69, 70; Scott, 'Collateral Estoppel by Judgment,' 56 Harv L Rev 1." (emphasis supplied.)

Respondents in the Court below took the position that the narrow form of estoppel by judgment would apply. (R. 9453). The court below, as heretofore shown, p. 19) did so construe the statute. In so doing, it was in error and ignored two vital elements calling for an application of the broad form of estoppel: 1. The causes of action were the same. 2. The public policy underlying Sec. 5.

1. *The causes of action were the same.*

The error of the Court below becomes evident when it is seen that the causes of action in the *GM* criminal case and the instant case are the same since both were based upon the same wrong, *i.e.*, the conspiracy, *Baltimore S.S. Co.* v. *Phillips*, 274 U.S. 316, 321, and the evidence in the instant case would have sustained the issues in the criminal case, *U.S.* v. *Haitian Republic*, 154 U.S. 118, 125; Restatement of the Law of Judgments, Par. 61, pp. 240, 241.

Since Petitioners' action plead the same conspiracy as is set forth in the indictment in the criminal case, Petitioners, of necessity, had to prove that conspiracy. That they did is quite obvious from the opinion of the Court be-

low stating that no question was raised as to the sufficiency of the evidence (R. 9452, 9469). The identicality of the causes of action further appears from the fact that virtually all of Petitioners' witnesses testified for the Government in the criminal case and much of Petitioners' documentary evidence was the same as that introduced by the Government.

Although different relief was asked, this does not destroy the application of the broad doctrine. *Green* v. *Bogue*, 158 U.S. 478, 501; *City of New Orleans* v. *Citizens Bank*, 167 U.S. 371, 396.

In the face of this showing of identicality and sameness and under the principles above set forth, p. 21, the Court should have given effect to the criminal judgment under the broad principles of res judicata even if there were no question as to public policy. The lack of mutuality of parties in no way affected such application since Section 5 did away with such requirement. However, in the sense that the Government represented victims of Respondents, priority existed.

2. *Public Policy.*

The estoppel set up by Section 5 is not to be construed under narrow principles of estoppel, since under its provisions there is no real estoppel in the sense that defendants could not offer evidence. To so construe it is in contravention of public policy as shown ante on p. 20.

Further, Congress intended that the private litigant have full use as prima facie evidence of all facts and evidence which the Government could use conclusively in another suit between it and the offender. Assuming the Government's case to be based on the same cause of action, as here, it is quite evident that it would be entitled to invoke the broad form of estoppel. *Local 167* v. *U.S.*, 291 U.S. 293, hereinafter discussed (pp. 24-26), is a perfect

example of this. Since Petitioners stand in the shoes of the Government in this case, they, too, were entitled to the same facts and evidence with prima facie effect.

**B. Under broad principles of estoppel, the criminal judgment was prima facie evidence of the cancellation of Emich Motors' franchises pursuant to the conspiracy.**

Under broad principles of estoppel as defined in the *Sunnen* case, *supra,* p. 21, 333 U.S. 591, 597, 598, Petitioners were entitled to offer the criminal judgment as evidence of "every matter which was offered and received to sustain" the indictment. In the criminal case evidence of the cancellation of Emich Motors' franchises because of its refusal to use GMAC was offered by the Government to sustain the existence of the conspiracy (Crim. R. 293-326). For detailed discussion of this evidence, see pp. 6-9, 33-35). Hence, obviously the judgment was evidence of the cancellation pursuant to the conspiracy.

As stated above, Petitioners, under Section 5, occupy the position of the Government. This being so, it is quite pertinent to inquire what matters are conclusively established in favor of the Government in its long pending equity suit against Respondents based on the same conspiracy charged in the indictment under which they were convicted. The same facts and matters as would be established in that suit are established as prima facie evidence for Petitioners.

The answer to this inquiry is given in *Local 167* v. *U.S.*, 291 U.S. 293, 295, 298, 299 reviewing on certiorari, *U.S.* v. *Greater New York Live Poultry C. of C.* (D.C., S.D. N.Y.) 53 F. (2d) 518, 519, and (DC., S.D., N.Y.) 44 F. (2) 393. The problem presented by those cases was as follows:

A number of defendants had been found guilty by a jury in an antecedent criminal case, *Greater N.Y. Live*

*Poultry C. of C.* v. *U.S.*, (C.A. 2) 47 F. (2d) 156, under an indictment charging them with a conspiracy to unreasonably restrain interstate commerce in poultry. The indictment set forth, not only the conspiracy, but also a substantial number of different means of carrying out the conspiracy as well as a large number of overt acts committed in furtherance thereof.

Thus, for purposes of comparison, the indictment in that case may be considered to be the same as the indictment in the case at bar. Moreover, to further the comparison, the Court in the criminal poultry case gave an instruction to the same effect as that given in the *GM* criminal case that it was not necessary for the Government to prove all the means and acts alleged in the indictment (See footnote 2, p. 18).

The jury returned a general verdict of guilty against some of the named defendants, whereupon the Government filed an equity suit under the antitrust laws to enjoin the conspiracy and its continuation, naming as defendants those who were convicted plus a number of other persons. The complaint realleged the indictment *in haec verba*. 53 F. (2d) 518, 519.

The convicted defendants filed answers denying all of the allegations of the complaint setting forth the indictment on which they had been found guilty. Thereupon the Government moved to strike such denials as sham. Defendants argued in opposition to the motion that

> "the Government could have established the guilt of defendants in the criminal case by proof of any one of the several overt acts alleged; therefore, the verdict did not *necessarily* adjudicate the commission of any specific overt acts on the part of the defendants." U.S. v. Greater New York Live Poultry C. of C., (C.A. 2) 44 F. (2d) 393, 394.

(The same argument was made by Respondents in the instant case and accepted by the court below. R. 9453-9455).

The District Court nevertheless struck the denials as sham on the ground that they were made "for obstructive purposes only". *U.S.* v. *Greater New York Live Poultry C. of C.* (C.A. 2) 53 F. (2d) 518, 520. Upon direct appeal to this Court, it approved the action of the trial court, stating (291 U.S. at pp. 298-299):

> "The judgment in the criminal case conclusively established in favor of the United States and against those who were found guilty that within the period covered by the indictment the latter were parties to the conspiracy charged. The complaint in this suit includes the allegations on which that prosecution was based. The defendants in this suit who had been there convicted could not require proof of what had been duly adjudged between the parties. And to the extent that the answers attempt to deny participation of convicted defendants in the conspiracy of which they had been found guilty, they are false and sham, and the District Court rightly so treated them."

There is no escape from the meaning of the *Local 167* case. It stands firmly for the proposition that convicted defendants cannot deny in the subsequent action the material matters which were determined in the antecedent criminal case, including, under the facts of the criminal poultry case, comparable to the *GM* criminal case, all of the terms, means and methods and overt acts alleged in the indictment, notwithstanding the *GM* criminal trial court-type instruction aforesaid.[1]

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[1] In the Local 167 case the point arose in an equity suit on a motion to strike the defendants' answers as sham. Thus the question as to what was adjudicated in the prior criminal case was quite obviously for the court. The court below in the case at bar seized on this in order to distinguish the Local 167 case from the instant case (R. 9453). In so do-

Thus, the Government in its equity suit against Respondents is in position to allege that every allegation of its criminal indictment has been adjudicated including those setting forth the means and acts by which the conspiracy was carried into effect.

This being so, Petitioners are, under Section 5, entitled to assert the same position.

**C. Even under the narrow principles of collateral estoppel, the criminal judgment established the cancellation of Emich Motors' franchises in pursuance of the conspiracy.**

Even if the Court below was correct in construing Section 5 as embodying the narrow principles of estoppel by judgment, it erred in its application of those principles. Since the overriding issue in the instant case was whether or not Emich Motors had been subjected to coercions by Respondents, including the cancellation of its franchises, the Court below should have inquired under narrow principles of estoppel, whether such matters were litigated and determined in the criminal case. *Commissioner* v. *Sunnen*, 333 U.S. 591, 598.

In deciding that the criminal judgment was not admissible as prima facie evidence of cancellation of Emich Motors' franchises pursuant to the conspiracy, the Court below gave an overriding effect to one of the trial court's instructions in the *GM* criminal case far beyond its mean-

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(Continued from page 26)
ing it begged the question as to whether or not such matters might not have been for the jury had there been one. Further, if, as the court below held, the scope and applicability of the judgment was for the trial court to find and determine (Rec. 9453, 9454), it would be incumbent upon it to inform the jury as to that determination. Since the Local 167 case establishes that the Respondents had been adjudicated guilty by the general verdict of the conspiracy, including all the means and acts alleged in the indictment, there could be no prejudicial error in permitting the jury to consider the indictment as evidence of those means and acts.

ing[1] (R. 9451, 9455). As is evident from its opinion, it

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[1] As justification for so doing, the Court of Appeals used this Court's opinion in **Ford Motor Company** v. U. S., 335 U. S. 303, 316-317. (R. 9458.) It construed this Court's opinion to mean that the trial Court's instructions in the GM criminal case were the best means by which to ascertain what the criminal judgment determined. But in that case, this Court used the instructions for that purpose only because the consent decree entered into by the Government and the defendants there, so provided. See 335 U. S. at p. 311. This Court's holding is obviously not applicable, absent such a provision. See discussion hereinafter as to sources to be examined to determine what has been adjudicated by a judgment. (p. 30.)

Even, giving the trial court's instruction in the criminal case an overriding effect, the judgment at the very least determined the following:

a. That the Respondents, in violation of Section 1 of the Sherman Act, entered into a conspiracy in undue restraint of interstate commerce in General Motors cars, with the object of monopolizing, to the greatest extent possible, the financing of such cars;

b. That the conspiracy included an agreement to coerce dealers in said cars to use GMAC by means alleged in the indictment.

c. That one or more overt acts were committed for purposes of venue;

d. That acts were committed pursuant to the conspiracy, sufficient in quantity and quality to amount to circumstantial proof of the existence of the conspiracy, including its terms and means, and to amount to proof that interstate commerce was unduly restrained by the commission of those acts.

The Court below in the instant case held that it was not necessary for the Government in the GM criminal case to prove that any act had been committed. (R. 9455.) This is directly opposite to what the Court below stated in its opinion in the criminal appeal. There the Court below held that proof of the commission of acts was necessary. It stated that the question as to whether there was coercion of the dealers in the free selection of a finance company "struck at the core" of the case. It further stated that the question as to whether the acts of coercion set forth in the indictment had been proved, and, if so, whether they effectuated an unreasonable restraint, were problems which fell "within the exclusive province of the jury." 121 F. (2d), p. 385; see, also, p. 401.

disregarded the body of the evidence there adduced.[3] and ignored its prior determination as to the criminal jury's findings on the issues involved. In so doing, the Court below was able to cast uncertainty on what was litigated and determined by the criminal judgment.

But there is no uncertainty that the essential issue in the criminal case involved the coercion of dealers by Respondents through withholding of cars and, ultimately, cancellations of franchises. Respondents have admitted this in their petition for certiorari to this Court, filed in the *GM* criminal case, stating "the only restraint of interstate commerce * * * charged or proved consists of the refusal of a manufacturer to ship to particular dealers. That is the theory on which the Government went to the jury and it is the theory on which the Circuit Court of Appeals upheld the conviction." (This Court, Oct Tm. 1941, No. 352 Pet. for Cert., p. 23). The most direct refusal to ship is, of course, cancellation of a dealer's franchise. A further demonstration of what were the main issues is found in this Court's opinion in *Ford Motor Co.* v. *U.S.*, 335 U.S. 303, 316-317, in which it interpreted the trial court's

[3] That the evidence should be given greater weight is clear from Mr. Justice Minton's opinion, while a judge of the Court of Appeals, in **Bigelow** v. **RKO Pictures**, 162 F. (2d) 520, in which an instruction comparable to that given by the trial Court in the GM criminal case was given. (See printed record, pp. 1266-1267; **Bigelow** v. **RKO Pictures**, 327 U. S. 251, Oct. Term, 1945, No. 444.) Thus in the Local 167 case, supra, p. 18, where a like instruction was also given, the Court relied on the pleadings to ascertain what the judgment determined, and as just pointed out, in **Bigelow** v. **RKO Pictures**, the Court relied on the evidence for that purpose. This was true in both cases, although an instruction comparable to the trial Court's instruction in the GM criminal case was given. It is evident that the Court below, since the elevation of Mr. Justice Minton, has overruled its holding in the **Bigelow** case, and has ignored the Local 167 case, which was approved by this Court.

instructions in the criminal case as drawing "a line between such practices as cancellation of a dealer's contract, or refusal to renew it, or discrimination in the shipment of automobiles as a means of influencing dealers to use GMAC, all of which fall within the common understanding of 'coercion' and other practices for which 'persuasion', 'exposition' or 'argument' are fair characterizations".

In determining whether or not the criminal judgment established these coercions, the Court below should have examined, not only the instructions, but also the pleadings and evidence, as well as its own opinion in Respondents' appeal from their conviction, since these are the prime sources for ascertaining what is determined by a judgment. *Oklahoma* v. *Texas*, 256 U.S. 70, 88; *Washington Gaslight Co.* v. *District of Columbia*, 161 U.S. 316, 319-321; *Steam Packet Company* v. *Sickles*, 5 Wall. 580. In fact, its opinion is deemed to be conclusive as to what the criminal judgment determined. Restatement of the Law of Judgments, Par. 69, p. 315.

Those sources indicate plainly that the coercions of withholding of cars and cancellations of franchises were issues which were litigated and determined by the jury in the criminal case. Hence the criminal judgment was evidence of such coercions under a narrow estoppel. To demonstrate this, we discuss those sources.

**(1) The Opinion of the Court Below in the Criminal Appeal. (C. A. 7) 121 F. (2d) 376.**

Unlike in the instant case, the Court below on the criminal appeal had no difficulty in ascertaining the jury's findings. It held not only that the conspiracy charged had been established but that the jury had found that coercions by withholding of cars and cancellations of franchises had been imposed upon dealers. In reaching this result, the

Court summarized the specific conduct embraced within the illegal concert of action as charged in the indictment in the same terms as it used in the opinion of the instant case. (R. 9450). It then made it quite clear that the criminal judgment determined that the respondents had engaged in that specific conduct. This is incontrovertible from those portions of the opinion wherein the Court below after detailing the coercive practices of withholding cars and cancelling dealers, pp. 393-396, stated as follows p. 397):

> "It is even plainer that the *jury finding of coercion* is supported by the evidence. *The coercive practices were many and varied* (not all detailed in this opinion), and directly aimed to compel dealer-purchasers to use GMAC in financing the wholesale purchase and retail sale of General Motors cars. *These practices occurred often and with sufficient continuity to constitute a definite course of business conduct. Undoubtedly the jury was warranted in attaching the coercion label to the action thus adopted by the appellants.*" (Emphasis supplied.)

It is clear beyond argument that the Court below held that the criminal case jury found that the coercions set forth in the indictment had, in fact, been imposed on dealers. This appears in the following language of the Court:

> "As we have shown in part A, the Government tried this case on the theory that the defendants had conspired to restrain the dealers' interstate trade and commerce in General Motors cars by monopolizing the financing essential to the movement of those cars. As we have shown in part B, in the course of the trial, *evidence was adduced which indicated the nature of the conspiracy, the purpose and object of the conspirators, the means adopted by the conspirators to carry out the conspiracy, such as the coercion and discrimination relating to dealers' use of GMAC, the effect of these restrictions upon financing,* and the role played

by financing in the movement of automobiles from factory to public. As we have shown in part C, *the jury resolved the disputed questions of fact against the appellants* * * *" (p. 402) (Emphasis supplied.)

Such holding is furthered from the following language of the opinion:

"We do not hesitate to hold that the *jury findings of conspiracy and coercion are supported by the evidence.* In fact we would have no difficulty, even on *a de novo analysis of the record* to conclude that the appellants were in position to impose and did impose their will on the independent dealer-purchaser, *not only as to how he was to conduct his business but also as to whether he was to conduct it at all.*" (p. 398)

"When the evidence is boiled down, it is seen at once that the appellants agreed among themselves *not to do business with any dealer who would not purchase the retail and wholesale service from GMAC. At first the non-use of GMAC facilities would bring upon the dealer much outside interference with the smooth operation of his business, later the continued non-use of GMAC facilities would affect his ability to secure cars, and eventually it would endanger his very economic existence.* In the usual case the recalcitrant dealer had become firmly established in his community and was operating a profitable business, when he was *given the ultimatum either to use GMAC or to liquidate his business.*" (p. 399)

"It is plainly inferable from the evidence, quite apart from the concrete acts and things done, that a conspiracy had been formed whose main object and purpose was to monopolize and to control to the greatest possible extent the financing of the trade and commerce in General Motors cars. That the appellants intended to monopolize this financing business *is further shown by the acts and things done pursuant to the conspiracy, i. e., the overt acts of coercion and*

*discrimination in connection with dealers' use of GMAC facilities.*" (p. 402)

"Such was the nature and object of the conspiracy that by its necessary operation, *as clearly evidenced by the overt acts of coercion and discrimination*, it would directly and unduly impede and burden the interstate trade and commerce of the dealers in General Motors cars." (p. 406)

"In part A we discussed at great length the fundamental theory of the prosecution, and included therein a consideration of the indictment, which consists of 72 paragraphs and goes into detail with respect to the matters charged and how they were to be accomplished. In part B we related the evidence contained in the record. In part C we demonstrated the sufficiency of the evidence. In part D we showed *that the facts alleged in the indictment and proved in the course* of the trial, stated a cause of action under the Sherman law." (p. 410) (Emphasis supplied.)

Thus, the opinion of the Court, which, for this purpose, is deemed to be part and parcel of the final judgment and the conclusive source of ascertaining what was adjudicated, shows that the criminal judgment determined not only that there was a conspiracy to be carried out by the means of withholding cars and cancellation of dealers' franchises, but also that the conspiracy was, in fact, carried out by all of the means as charged in the indictment.

**(2) The Evidence.**

That the coercions referred to by this Court in the *Ford* case, 335 U. S. 303, 316-317, and the Court of Appeals in the GM criminal case, 121 F. (2d) 376, were litigated and determined in that case is clear from the evidence adduced by the Government in the criminal case. See summary of this evidence at pp. 6-10, ante. It is also clear that they were imposed upon Emich Motors. At the GM criminal trial, the Government contended (Crim. R. 1877-1890), and Fred

Emich testified, to the effect that Emich Motors' franchises were cancelled pursuant to the conspiracy because it refused to use GMAC. (Crim. R. 293, 324.) Respondents contested this issue vigorously, maintaining that those franchises were cancelled because Emich was an unsatisfactory dealer.[1] Seven witnesses testified in behalf of Respondents on this issue[2]. Six of those seven testified on those same matters against him in the instant case, the seventh having died before he could take the stand. (p. 10.)

The Court of Appeals itself, in its opinion in the criminal case, *U. S.* v. *General Motors,* 121 F. (2d) 376, 395, 396, in detailing the coercions imposed by Respondents on dealers "for the purpose of compelling their use of GMAC", relied on Emich's testimony as evidence of those coercions.

In so doing, the Court, at p. 396, found Emich's testimony established the following discriminations and coercions practiced by Respondents for the purpose of compelling his use of GMAC:

1. Receipt by Emich Motors of unordered cars and trucks.
2. Threats by officials of Respondents at Annual Contract Renewal Meetings and other places.

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[1] Respondents offered a defense only as to 20 of the 48 dealer witnesses who testified against them. 121 F. (2d) 395. Emich was one whose testimony was bitterly contested. Respondents there offered evidence against him including customers' complaints and alleged overcharging in finance deals, as they did in the instant case.

[2] Balcom, Crim. R. 1161-1169; Doran, Crim. R. 1301-1304; Hill, Crim. R. 1315-1333; Smith, Crim. R. 1334-1336; Holler, Crim. R. 1657-1659; Knudsen, Crim. R. 1837-1838.

3. Shipping to Emich Motors of cars of wrong models and colors.
4. Great quantities of unordered accessories were forced upon it.
5. Emich Motors was required to send blank checks to the factory before cars were shipped to it.
6. Cancellation of Emich Motors' franchises.

It is thus apparent from this evidence and its use by the Court below in the criminal appeal, that the cancellation of Emich Motors' franchises pursuant to the conspiracy was a matter actually litigated and determined in the criminal case, and was established with such certainty as to satisfy the narrow doctrine of collateral estoppel. Hence, the Court below somersaulted from its prior opinion in holding in the instant case that the criminal judgment, under Section 5, was not prima facie evidence of these coercions.

### (3) The Pleadings.

It is elementary that a conspiracy may be sustained by proof either that the purpose thereof was illegal, or that the means and acts by which the conspiracy was to be carried out were illegal. The indictment in the *GM* case amounted to a charge of both, *i.e.*, that the purpose was illegal and that the means and acts by which the conspiracy was to be carried out were illegal. Thus, all allegations in the indictment of the conspiracy, its terms, means and methods, and acts, were well-pleaded and material. *Pettibone* v. *U. S.*, 148 U. S. 197, 203; *Frankfort Distilleries* v. *U. S.*, (C. A. 10) 144 F. (2d) 824, 832 (rev'd on other grounds, 324 U. S. 293); *U. S.* v. *Armour & Co.*, (C. A. 10) 137 F. (2d) 269, 271; *American Tobacco Co.* v. *U. S.*, (C. A. 6) 147 F. (2d) 93, 107.

Respondents' pleas of not guilty put in issue every material allegation of fact contained in the indictment. *U. S.* v. *DeAngelo* (C. A. 3) 138 F. (2d) 466, 469; *Luteran* v. *U. S.* (C. A. 8) 93 F. (2d) 395, 400; *Ezzard* v. *U. S.*, (C. A. 8) 7 F. (2d) 808, 811. Throughout the trial the Respondents' pleas of not guilty served as their continuing denials of the evidence offered against them by the prosecution pursuant to its ever-present burden of proof. *U.S.* v. *DeAngelo* (C. A. 3) 138 F. (2d) 466, 469; *Smith* v. *U. S.* (C. A. 8) 208 F. 131, 133; *Prettyman* v. *U. S.*, (C. A. 6) 180 F. 30, 42.

Thus, all material allegations of the indictment, including the terms, the means of effectuating the conspiracy, and acts committed in furtherance thereof were at issue. The jury returned a verdict against the defendants finding them "Guilty in manner and form as charged in the indictment" (R. 7495).

The verdict plainly signified "that the jury sustained each and all of the averments of the indictment, including not only those relating to the body of the crime charged, * * * but also those relating to its alleged incidents." *Chesavoir* v. *U. S.*, (App. D. C.) 32 F. (2d) 945, 947; *Statler* v. *U. S.*, 157 U. S. 277, 279.

As stated in Bishop's New Criminal Procedure, Vol. I, p. 870:

> "If the jury mean to convict the defendant of *everything alleged*, any expression of the idea, however brief, will be adequate. The full and orderly phrase is 'in manner and form as charged against him in the indictment', and it is practically to be chosen." (Emphasis supplied)

See, also, *Everett* v. *Everett*, 215 U. S. 203, 215-216, holding that where the earlier adjudication may have been founded upon one or more of the material issues raised

therein, the presumption arises that all such issues were actually determined. This is the general rule followed in Illinois, *Rhoads* v. *City of Metropolis*, 144 Ill. 580, 586,[1] and in Indiana where the GM criminal judgment was rendered. *Day* v. *Valette*, 25 Ind. 42. If the jury meant to find the defendants guilty of less than all the means and acts charged, it could have returned a special verdict.

## III.

## The Indictment Was Properly Admitted and the Trial Court's Instructions Relative To It Were Correct, Even As Interpreted By The Court Below. In Any Event, The Admission Of The Indictment Could Not Constitute Prejudicial Error.

### A. The indictment was properly admitted.

There are at least five compelling reasons why the indictment was admissible to the jury.

*First, its admissibility was essential to establish that the conspiracy in this case was identical with that in the prior criminal case.*

Defendants not only made this an issue by their answer (R. 31, 32) but argued repeatedly and insistently to the jury that no such identicality existed.[2]

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[1] That the Illinois rule is to admit the prior adjudication as prima facie proof of all material matters put in issue and litigated in the earlier case is in itself sufficient to warrant its admission for such purpose in this case, pursuant to the authority of Rule 43(a) (2d sentence) of the Federal Rules of Civil Procedure.

[2] For example, the defendants argued in their opening statement (R. 304):

> "It is true that the complaint says that it is the same conspiracy. **But is it?** That is a question * * * what conspiracy was established by the judgment over there."

Similarly, defendants argued in closing (R. 7210, 7211):

> " * * * that judgment (in the criminal case) is a **red herring** and had absolutely nothing to do with it (the instant case) * * * (the criminal case) was a **different trial** * * * **different case** * * * **different** witnesses."

When such is the issue, this Court and other authorities have always permitted the pleadings in the prior case to go to the jury. *Washington Gaslight Co.* v. *District of Columbia*, 161 U. S. 316, 319-321; *Steam Packet Co.* v. *Sickles*, 5 Wall. 580; *Hornbuckle* v. *Stafford*, 111 U. S. 389, 391, 393; *Young* v. *Black*, 7 Cranch 565, 567; *Hopkins* v. *Lee*, 6 Wheat. 109, 116; *Campbell* v. *Rankin*, 99 U. S. 261.[1]

This is a salutary rule, for without the pleadings, the jury lacks the information indispensable for resolving this issue.

*Second, the indictment was admissible to permit the jury to exercise its functions under the statute.*

If the statute had given the criminal judgment a conclusive instead of a *prima facie* effect, the existence of the general conspiracy would have been conclusively established and the question of its existence would not have come within the province of the jury. Since, however, the statute gives the prior adjudication only a *prima facie* effect, the jury must decide this question no less than other questions in the case.

The jury's function in this case, under the statute, was to weigh the criminal judgment along with the other evidence adduced, to determine whether the conspiracy of which Respondents were convicted had been established in this case. The jury could not have intelligently discharged that function without being given a full under-

[1] To the same effect, see Am. Jur. Vol. 30, pp. 993, 998, and Vol. 20, p. 376; Greenleaf on Evidence (Rev. Ed., 1897), Vol. 1, pp. 812, 831; Jones on Evidence (4th Ed.), Vol. 2, pp. 1178-1179; C.J.S., Vol. 31, pp. 193-194; **Gibson v. Robinson**, 90 Ga. 756, 763; **Eastman Kodak Co. v. Southern Photo Materials Co.** (C.A. 5) 295 Fed. 98, 101, affm'd 273 U.S. 359; **Converse v. Sickles**, 146 N.Y. 200, 207, 4 N.E. 777; **Hexter v. Bast**, 125 Pa. 52, 72-73, 17 A. 252, **Little Bros. v. Barlow**, 37 Fla. 232, 234, 235; **Clem v. Meserole**, 44 Fla. 234, 238.

standing of the contentions of the Government and Respondents in the criminal case, the issues there made and litigated, and the verdict and judgment. To hold that it was erroneous for the jury to view even the pleadings is to take away any rational basis for its judgment, and thus to require it to do either the impossible or the irrational.

The force of this argument is such as to justify the admission of the evidence to the jury as well as was approved in *Washington Gaslight Co.* v. *Dist. of Columbia*, 161 U. S. 316, 319-321. Petitioners, however, were not permitted to introduce to the jury the evidence adduced in the criminal case (R. 443).

*Third, the indictment was properly admitted because the criminal judgment incorporated it by reference, hence was incomplete in meaning without it.*

In the criminal case two judgments were entered, (R. 7496, 7497), one against each respondent. They recited in each instance that the "defendant having been convicted on Finding of Guilty by the Jury of the offense charged in the indictment, in the above entitled cause, to-wit: Sherman Anti-Trust Law, Sec. 1, Title 15, U.S.C.A.—one count of indictment" was thereupon ordered to pay a fine of $5,000.

The verdict of the Jury found the Respondents "Guilty in manner and form as charged in the indictment" (R. 7495). The admission of the verdict was not held by the Court below to be erroneous and was introduced by the Respondents (R. 6970).

It is obvious that the judgment included the indictment and was not only incomplete but unintelligible without it. Hence, the indictment was properly admitted as an

integral part of the judgment and to make it understandable.

*Fourth, exclusion of the indictment would frustrate public policy.*

Realistically, the conviction, denuded of the indictment, would have little, if any, value in the face of the dramatic staging of the defense, during which more than 100 living witnesses were called to deny the conspiracy (R. 9330, 9364), including such high executives of General Motors as Chairman Sloan (R. 3774, 3877) and Chevrolet President Coyle (R. 6928).

Especially is this true in view of the fact that the holding necessarily prevents Petitioners from making any effective arguments to the jury as to the identicality of the conspiracy as charged in the indictment and alleged in the complaint and the evidentiary weight to be attached to the conviction. Any departure in argument from the legalistic metes and bounds of the conviction as delimited by the Court below[1] would create the likelihood of reversible error.

Under these circumstances, plaintiffs could not safely avoid the time, labor and expense of reproducing the Government's case.

Thus, as previously argued, pp. 12-18 *ante*, the statutory policy to relieve the private suitor of these burdens would be thwarted.

*Fifth, the statute sanctions the admission of the indictment.*

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[1] The opinion below apparently would limit the jury instructions to a statement that the conviction was "prima facie evidence that defendants had been guilty of a conspiracy to restrain dealers' interstate trade and commerce in General Motors' cars for the purpose of monopolizing the financing essential to the movement of those cars" (R. 9454).

As before stated, p. 18, the construction of the statute by the Court below leads to absurd results and frustrates public policy. It must therefore be disfavored unless compelled by the terms of the statute. *Haggar Co.* v. *Helvering,* 308 U. S. 389, 398. Further, a statute will not be given a construction by which its effectiveness would be seriously impaired, where a different construction is possible. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 381, 392.

There is no compulsion to construe the Statute so as to frustrate public policy. When courts have permitted the introduction to a jury of a previous "judgment" to prove the facts upon which it is founded, they have always understood the term as meaning the entire record. *Hornbuckle* v. *Stafford,* 111 U. S. 389, 391, 393. Therefore, when Congress authorized the admission of the "final judgment" to prove the facts upon which it was founded, it must be presumed to have employed that term in its established legal signification. *Case* v. *Los Angeles Lumber Co.,* 308 U. S. 106, 115; *Keck* v. *U. S.,* 172 U. S. 434, 446. In short, under the wording of the statute, the indictment was admissible to the jury. Under the same doctrine, Petitioners should have had the benefit of the entire record, a benefit which the trial court denied them (R. 443).

**B. The Court of Appeals misinterpreted the Trial Court's instructions covering the admission of the indictment.**

The court below held that the indictment was not admissible to the jury because it gave evidentiary value to the acts and means therein charged. It held that the trial court's instructions aggravated this error (R. 9455, 9456). In so holding, the Court misinterpreted those instructions as though they permitted the jury to consider the indictment to be evidence of Emich Motors' cancellations (R. 9455-9458).

The instructions, as a whole, demonstrate that little evidentiary value was assigned to the indictment. The trial court first summarized the contents of the complaint, indictment and answer, characterizing them as "allegations" of th parties. (Note terminology: "avers", "alleges", "assert", R. 9095-9097). Having identified the indictment as being a part of the complaint (R. 9095), the trial court then stated the complaint is "not evidence" and "not to be considered proof of the things alleged" (R. 9098).

It then told the jury that not every allegation of the indictment had to be proven by the Government (3rd full par., R. 9101.

Hence, there is no foundation for the Court of Appeals' conclusion that the jury was permitted to use the indictment as evidence that the means and acts therein charged were committed.

**C. Even as interpreted by the Court of Appeals, the instructions were proper and the admission of the indictment could not have been prejudicial error.**

The instructions were proper in any event. The instructions, even if permitting the indictment to be considered evidence of cancellations, would be proper despite the limitations of the doctrine of estoppel by judgment as conceived by the Court below, because no uncertainty existed as to the facts upon which the conviction was founded. As seen, the criminal case turned upon the element of coercion of the dealers by withholding of cars and by cancellation of dealers' franchises (pp. 27-30). Further, the judgment established all of the means and acts of the conspiracy alleged in the indictment (pp. 24-37). Hence, permitting the jury to use the indictment as *prima facie* evidence of the acts and means therein charged would not be improper.

If the trial court had followed the procedure set out by the Court of Appeals, (R. 9454) it would have been obliged to inform the jury that the criminal judgment determined all means an . acts charged in the indictment.

The simplest way for the trial court to have done so would have been to read the indictment to the jury. It is therefore illogical to hold that permitting the jury to read for themselves what the court should have read to them is prejudicial error.

## IV.

**Under The Doctrine Of Res Judicata, And Independent Of Section 5, Respondents Are Conclusively Estopped By The Criminal Judgment Against Them, From Denying The Conspiracy Of Which They Were Convicted And Its Impact Upon Petitioners, Since There Was An Identity Of Such Issues In Both The Criminal Case And The Case At Bar. Under Such Circumstances, There Is No Requirement Of Mutuality Of Parties.**

As heretofore demonstrated, pp. 24-26, Petitioners assert that, under Section 5 of the Clayton Act they were entitled to rely on the criminal judgment as *prima facie* evidence of every matter which was offered and received to sustain the indictment. We reasoned that since the causes of action were the same in the instant case and in the criminal case, being based on the same conspiracy, and also in the sense that the evidence in the former would have sustained the issues in the latter, therefore the broadest principles of *res judicata* applied. Section 5 having put petitioners in the shoes of the Government, did away with the requirement of mutuality of parties.

However, in recent years a modern doctrine of the law has developed, independent of statute, that such mutuality is not always necessary and that there are exceptions to the requirement. These exceptions are based

upon the reasons and public policy that gave birth to the doctrine of res judicata. The basis of the doctrine has been stated as follows:

> "The doctrine of res judicata may be said to inhere in the legal systems of all civilized nations as an obvious rule of expediency, justice, and public tranquillity. Public policy and the interest of litigants alike require that there be an end to litigation which, without the doctrine of res judicata, would be endless. *The doctrine * * * rests upon the ground that the party to be affected, or some other with whom he is in privity, has litigated, or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction,* and should not be permitted to litigate it again to the harassment and vexation of his opponent. The doctrine of res judicata not only puts an end to strife, but produces certainty as to individual rights and gives dignity and respect to judicial proceedings. It is considered that a judgment presents evidence of the facts of so high a nature that nothing which could be proved by evidence aliundè would be sufficient to overcome it; and therefore it would be useless for a party against whom it can be properly applied to adduce any such evidence, and accordingly he is estopped or precluded by law from doing so * * *" (30 Am. Jur., Judgments, § 165) (Emphasis supplied).

This Court on numerous occasions has invoked the same basis for the doctrine, *Lovejoy* v. *Murray*, 3 Wall. 1; *Postal Telegraph C. Co.* v. *City of Newport, Ky.*, 247 U. S. 464, 476; and has stated most recently in *Commissioner* v. *Sunnen*, 333 U. S. 591, at p. 597, that res judicata "rests upon considerations of economy and public policy favoring the establishment of certainty in legal relations".

It is thus quite plain that the heart of the doctrine rests upon a recognition that he who has had his day in court and lost on a question of fact should not be permitted to relitigate the same fact. To permit him to do so violates public policy.

The exception to the requirement of strict mutuality rests upon that same public policy in favor of one who was not a party to the first suit and does not violate the due process guarantee since the party against whom the doctrine is invoked has had his day in court on the same issues.

Freeman puts it thus:

> " • • • The rule of mutuality is itself based upon policy and practical necessity and justice, as is the whole doctrine of res judicata, and on the same grounds of policy and justice *there would seem to be no objection to departing from it* where the party affected has been given one *adequate opportunity to be heard* either personally or by representation." 1 Freeman on Judgments (5th ed. 1925, Sec. 429, pp. 935, 936. (Emphasis supplied).

Judge Stephens, sitting on a 3 judge court, in a separate opinion in *U. S.* v. *U. S. Gypsum Co.*, 51 F. Supp. 613, 628, followed this reasoning as did the court in the case of *Coca-Cola* v. *Pepsi-Cola Co.*, 6 W. W. Harr. 124 (Del. Super.), 172 A 260, 263.

Further indication of the tendency of the Courts not to insist on strict mutuality of parties is seen in recent cases where they have relaxed the rule of exclusion of judgments in criminal cases as evidence in civil cases involving the same facts but not the same parties. Thus, where a party to a civil case has been previously convicted in a criminal case relating to the same factual situation which is in issue in the civil case, it has been held that

the record of his conviction is admissible against him on the grounds of *estoppel* although his opponent was not a party to the criminal case. *Austin* v. *U. S.* (C. A. 7) 125 F. (2d) 816, 818, and cases cited therein. Such holdings are based upon a recognition that the convicted person has had his day in court.

This Court has also acknowledged exceptions to the rule of mutuality of parties and has observed that there is no such requirement in some res judicata cases involving master and servant, principal and agent, and indemnitor and indemnitee. *Bigelow* v. *Old Dominion C. Min. & S. Co.*, 225 U. S. 111, 127. Its reasoning in that case, when brought to a logical conclusion, indicates that the basis therefor is that the party against whom the doctrine of res judicata is invoked has had his day in court. In *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U. S. 381, 402, this Court stated that "where the issues in separate suits are the same, the fact that the parties are not precisely identical is not necessarily fatal."

In view of the principles of public policy upon which res judicata is based and the modern tendancy of the law, and since the doctrine "is to be applied in particular situations as justice and sound application of the policy behind the doctrine require", *Monagas* v. *Vidal*, (C. A. 1) 170 F. (2d) 99, 106, this Court, as an advancement in the development of laws promoting substantial justice, should hold that where there is identity of issues and a judgment on the merits in the first case, the only requirement should be that the one *against* whom the former judgment is invoked should have been a party to it. The relationship between the one invoking the judgment and the parties to the previous litigation is immaterial and mutuality in those cases should be disregarded. See 35 Yale Law Journal 607, 612; 9 Va. Law Register (N. S. 1923) 241-255.

We urge this court to so rule. In that even, Petitioners need not rely on Section 5 in order to obtain the use as prima facie evidence of those matters offered and received in support of the Government's case. Under such a holding, the conspiracy, and the cancellation of Emich Motors pursuant to it( See pp. 24-37) are established conclusively and Respondents are barred from asserting any defense to Petitioners' action save on the question of damages. The other grounds for reversal in the Court below, which we maintain are grieviously and manifestly in error but which we have not briefed due to the limited grant of certiorari, would disappear as they should.

The Court below was able to reverse only by openly bypassing of Petitioners' evidence (R. 9452, 9469), ignoring the glaring dishonesty of the defense which no evidence offered by Respondents could dispel, finding trial court rulings never made and argumentative positions never taken, disregarding the most rudimentary principles of review and finally by flying in the face of established principles of law.

Should this Court find that the instant case comes within the exceptions to the requirement of mutuality of parties, we would urge it to permit us to argue the holding of the Court below on damages, a holding which violates *Bigelow* v. *RKO Pictures,* 327 U. S. 251.

Thus an end could be brought to this litigation, which has extended over a period of ten years, culminating in a trial lasting four and one-half months. A new trial which must be undergone unless this Court considers the other erroneous grounds for reversal is unthinkable because the evidentiary largesse granted Respondents by the lower Court far outweighs any benefits Petitioners may have under Sec. 5 and permits Respondents to draw it out to interminable length. The rulings of the Court

below opened the door to Respondents' use of the negative testimony of thousands of GM dealers that they had not been coerced to use GMAC. In addition, they permit Respondents to introduce testimony of matters never coming to their attention in order to corroborate their asserted state of mind.

The case at bar itself provides a salutary reason for such a rule. As pointed out previously, respondents vigorously contested every issue raised by the pleadings in the criminal case, including those relating to cancellations of dealers. They have had their day in court. Ought they be permitted to contest in individual cases those same issues against every victim of their conspiracy? There would indeed be no end to litigation.

## CONCLUSION.

We submit respectfully that the Court of Appeals in its holdings, heretofore discussed and analyzed, has nullified the public policy underlying Section 5 of the Clayton Act. It has also misinterpreted and misapplied the principles of res judicata and estoppel by judgment. In so doing, it has fettered victims of large scale anti trust conspiracies so that they are at the mercy of their oppressors and impotent to secure redress in Courts of Law. Such a situation is intolerable and demands correction by this Court.

Further, the substantial justice underlying the doctrine of res judicata requires that those who violate the anti-trust laws and are brought to justice by the Government after lengthy trials during which they have had their day

in Court and full opportunity to defend themselves ought not be permitted to again litigate those same issues against those injured by their criminal conduct.

Respectfully submitted,

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Dated: December 12, 1950.